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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Bruce Collins
Vice President and General Counsel

July 11, 1996

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Fifth Further Notice of Proposed Rule Making; MM Docket No. 87-268

To Whom It May Concern:

Enclosed are twelve copies of C-SPAN's comments in the above-referenced proceeding.

Cordially,

NATIONAL CABLE SATELLITE CORPORATION

By: _____
Bruce D. Collins, Esq.
Corporate Vice President &
General Counsel

Encl.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact Upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	
	)	

COMMENTS OF C-SPAN AND C-SPAN 2
(National Cable Satellite Corporation)

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To: The Commission

COMMENTS OF C-SPAN AND C-SPAN 2
(National Cable Satellite Corporation)

I. INTRODUCTION and SUMMARY

C-SPAN and C-SPAN 2 (the "C-SPAN Networks") are fulltime satellite delivered public affairs television programming services available primarily via cable television, and devoted entirely to information and public affairs, including the live gavel-to-gavel coverage of the proceedings of the U.S. House of Representatives (on C-SPAN), the U.S. Senate (on C-SPAN 2) and a variety of other events at public forums around the country and the world.[1] The C-SPAN Networks are produced and distributed by the National Cable Satellite Corporation ("NCSC"), a non-profit and tax-exempt District of Columbia corporation.

These comments use the opportunity presented by this above-captioned *Fifth Further*

[1] C-SPAN is available in over 67.1 million households. C-SPAN 2 is available in over 44.4 million households.

Notice of Proposed Rulemaking (the *Fifth Notice*), focusing on the technical aspects of Advanced Television Systems, to argue that the Commission should not grant must carry status to the new digital broadcast services. While we recognize that the earlier *Fourth Further Notice of Proposed Rulemaking*[2] was the more appropriate forum for this argument, the Supreme Court's recent decision in *Denver Area Educational Telecommunications Consortium, Inc., et al. v. FCC, et al*[3] (the *Denver* case) contains significant legal guidance on the issues of compelled speech and of regulatory forbearance in telecommunications that we believe should be considered by the Commission.

II. THE CONTEMPLATED MODIFICATION OR EXPANSION OF THE MUST CARRY OBLIGATIONS WOULD CONSTITUTE 'PILING ON': IT WOULD FURTHER INFRINGE C-SPAN's FIRST AMENDMENT RIGHTS AND WOULD DISSERVE THE PUBLIC INTEREST

Our strong opposition to the must carry rule has been expressed in comments in earlier rulemakings and should by now be well known to the Commission.[4] In response to the direct and measurable harm the C-SPAN Networks and their audiences had already suffered as a result of the rule, we joined as one of several cable programmer co-plaintiffs in a constitutional challenge to the must carry provision of the 1992 Cable Act.[5] Now, in the Commission's rulemaking on Advanced Television Systems, the specter of losing literally millions more subscribers to our public service programming looms large.

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[2] *Fourth Further Notice of Proposed Rulemaking,* MM Docket No. 87-268 (Advanced Television Systems)(1995).

[3] No. 95-124, Decided June 28, 1996.

[4] *See, e.g.,* NCSC Comments in MM Docket No. 92-259 (1992).

[5] *Turner Broadcasting System et al. v. FCC,* 114 S.Ct. 2445 (1994).

There is absolutely no doubt that if broadcasters continue to have the benefit of a government imposed preference for access to a cable system's limited channel capacity, and if that preference is expanded,[6] then C-SPAN's and C-SPAN 2's unique form of programming will disappear from households across the country. That result would be not only constitutionally unfair to the C-SPAN Networks and other cable programmers, it would also in the end be a disservice to the Commission's statutory mandate to serve the public interest.

We also wholeheartedly agree with the comments of the National Cable Television Association (in response to the *Fourth Further Notice*) that the FCC would be unwise to "pile on further intrusions on speech"[7] by mechanistically carrying the must carry rule over to the still-uncertain digital era -- particularly in light of the great uncertainty cast by the Turner decision over the constitutionality of the rule as it now stands.

III. THE COMMISSION SHOULD BE MINDFUL OF THE SUPREME COURT's CLEAR GUIDANCE ON THESE ISSUES CONTAINED IN THE RECENT *DENVER* CASE

A. The Dynamic Nature of the Telecommunications Industry Demands Care in Establishing Regulatory Schemes, and Particularly So When First Amendment Rights are Involved

In its *Denver* decision the Supreme Court took several opportunities throughout the 118 pages comprising six separate opinions to caution government about the dangers inherent in regulating a rapidly changing cable television industry (with regard to leased access and public access channels). In his majority opinion, for example, Justice Breyer discussed the importance of narrowly tailoring restrictions on speech and of the need to resist the easy

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[6] *Fourth Further Notice* at Para. 79 *et seq.*

[7] Comments of NCTA at 8.

application of existing regulatory schemes to that end. He wrote, "aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications [citations omitted], we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now."[8] He then cited *Columbia Broadcasting*,[9] to nail down his point: "The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now and those acceptable today may well be outmoded 10 years hence."[10] This discussion was preceded with a reminder that "Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."[11]

In a concurring opinion Justice Stevens also acknowledged the problem: "I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this.[12] In his concurrence Justice Souter was also direct: "All of the relevant characteristics of cable are presently in a state of technological and regulatory flux."[13] He argued that the impending convergence of technologies will lead to the day when "we can hardly assume that standards for judging the

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[8] Breyer at 11.

[9] *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94 (1973).

[10] Breyer at 12.

[11] Breyer at 10.

[12] Stevens at 1.

[13] Souter at 3.

regulation of one of them will not have immense, but now unknown and unknowable, effects on the others." He spoke of the changes in the telecommunications industries that will "enormously alter the structure of regulation itself" as reason enough "to be shy about saying the final word today about what will be accepted as reasonable tomorrow."[14] Finally, and most definitively, he noted that given the "fluidity" of the telecommunications industries (again, in this case cable television), he urged government "simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology."

The Court could not have spoken with a clearer voice. For many years its message has been that government regulators should proceed with caution when imposing restrictions on any First Amendment rights; but here in *Denver*, the Court is emphasizing that *extreme* caution is necessary when regulators deal with the rapidly changing telecommunications industry. That caution is best exercised, advises the Court, by waiting for technologies to mature to determine whether novel regulatory schemes suppressing speech should be erected. Caution is also exercised by the simple expedient of resisting the urge to do the same old thing the same old way.

The Commission should heed this caution by resisting the urge to haul out the old must carry rule for application to broadcasters' future digital channels.

B. The *Denver* Decision, by Bolstering the Jurisprudence of the *Turner* Decision, Further Weakens the Validity of the Must Carry Rule

In both the Court's majority decision in *Denver* and in Justice Thomas's dissenting opinion, the frequent citations of the *Turner* decision's recognition of cable television's First

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[14] Souter at 4.

Amendment status provide further indication of the weak constitutional ground upon which the must carry rule stands. For example, Justice Breyer in his majority opinion cites *Turner* in acknowledging that cable programmers such as the C-SPAN Networks, have a clear First Amendment interest when channels upon which we might otherwise be carried are given over by statute to leased or public access programmers.[15] Later, he described *Turner* as the case "in which this Court stated that cable broadcast receives *full* First Amendment protection"[16] [emphasis supplied]. Also, he cited *Turner* to note that the Court will not assume that an alleged harm exists or that a particular regulation is the appropriate response unless there is a solid factual basis for justifying both.[17] The Commission should be mindful of this additional caution as it contemplates must carry status for a broadcaster's digital channels without any record of any kind as to whether the broadcaster would be harmed without such protection, much less whether the public interest would be harmed.

Even in dissent on the details of *Denver's* focus on leased and public access issues, Justice Thomas agreed with the fundamental conclusions in *Turner* that "cable operators are generally entitled to much the same First Amendment protection as the print media."[18] With respect to the must carry rule in particular, he again cited *Turner* to note that "the FCC's must carry rules implicated the First Amendment rights of both cable operators and cable

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[15] Breyer at 13.

[16] Breyer at 17.

[17] Breyer at 36.

[18] Thomas at 5.

programmers."[19] He further noted that the rules forced operators to carry programming they did not want and they harmed a programmer's ability to gain carriage on the fewer available channels. Justice Thomas was also willing, on the basis of *Turner*, to suggest that even the leased and public access provisions of the Cable Act (which he called "forced speech") might not pass constitutional muster.[20]

Regardless of whether Justice Thomas's broader view of *Turner's* reach prevails, it is clear from both his dissent and from the majority opinion in *Denver* that the Court is firm in its conclusion that cable operators and cable programmers like the C-SPAN Networks enjoy strong First Amendment protections that will not be lightly disregarded. We respectfully suggest that the Commission heed these clear signals as it decides whether to automatically apply the must carry rule to the digital era.

IV. CONCLUSION

The Commission should not grant must carry status to broadcasters' digital channels for several reasons, not the least of which is our view that the must carry rule is unconstitutional. To the extent the Commission might be unpersuaded to that view, we urge

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[19] Thomas at 6.

[20] Thomas at 10 (including note 6).

it to read closely the Supreme Court's *Denver* decision for clear guidance that the must carry rule as it might be applied to the still-unproven digital era, would never pass the constitutional tests set up by *Turner*.

Respectfully submitted,

NATIONAL CABLE SATELLITE CORPORATION,
d/b/s C-SPAN

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